

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

WEDNESDAY, THE 21ST JUNE 2006 / 31ST JYAISHTA, 1928

CRP.No. 2630 of 2002()

AGAINST THE ORDER DATED 14/08/2002 IN IA. 1784 /1999 IN
OS.16/1992 OF MUNSIFF'S COURT, HARIPAD

REVN. PETITIONERS: PETITIONERS-PLAINTIFFS:

1. NEELAKANTA PILLAI BHARGAVA PANICKER,
PAYKKATTUVAKA NAGAROORPUTHEN VEETIL,
MUTHUKULAM THEKKUM MURI, MUTHUKULAM VILLAGE.
2. RAJASEKHARAN PILLAI,
S/O.NEELAKANTAPILLAI BHARGAVAPANICKER OF -DO- -DO-

BY ADV. SRI.K.P.DANDAPANI

RESPONDENTS: CR.PETITIONERS-DEFENDANTS:

1. MADHAVAKURUP DASAPPAN PILLAI,
VADASSERIL KIZHAKKATHIL VEETIL,
MUTHUKULAM THEKKUM MURI, MUTHUKULAM VILLAGE.
2. SURESH KUMAR, S/O. MADHAVAKURUP,
DASAPPAN PILLAI OF -DO- -DO-.

BY ADV. SRI.GEORGE VARGHESE(PERUMPALLIKUTTIYIL)

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 21/06/2006, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

CMP.NO.6613/2002 IN CRP.NO.2630/2002

DISMISSED

21/6/2006

SD/- K.T.SANKARAN, JUDGE

//TRUE COPY//

ahz/

K.T. SANKARAN, J.

C.R.P.NO. 2630 OF 2002 D

Dated this the 21st day of June, 2006

O R D E R

The question involved in this revision is whether the plaintiffs in a suit could be granted permission to withdraw the suit with liberty to institute another suit on the basis of a cause of action different from the one involved in the suit.

2. The revision petitioners filed O.S.No.16 of 1992, on the file of the Court of the Munsiff of Haripad against respondents for permanent prohibitory injunction, for fixation of boundary and for mandatory injunction. The plaintiffs claimed title to an extent of one cent 650 Sq.links of land (plaint A schedule property). They purchased it from a larger area having an extent of 22 cents. The plaintiffs have constructed a building in the property purchased by them and are doing business there. Plaint B schedule item Nos.1 and 2 admittedly belonged to the first defendant. The first defendant had also

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purchased B schedule item Nos.1 and 2 from out of the total extent of 22 cents. The plaintiffs alleged that under the pretext of making certain constructions, the defendants removed the boundary stones demarcating plaint A and B schedule properties and in that process encroached upon a small portion of plaint A schedule property. The defendants denied the allegations made in the plaint. On the other hand, the defendants contended that the plaintiffs have encroached upon their property and on that allegation, they filed O.S.No.57 of 1993 for recovery of possession of the encroached portion.

3. The trial court partly decreed O.S.No.16 of 1992 in favour of the revision petitioners/plaintiffs. The prayer for mandatory injunction was granted and the other reliefs prayed for were rejected. Challenging the judgment and decree of the trial court, the revision petitioners filed A.S.No.86 of 1995. The Appellate Court confirmed the findings of the trial court. However, The appellate court found that it is necessary to determine the right and title in respect of the 560 Sq.links. Accepting the

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submissions made by the revision petitioners/appellants, the case was remanded to the trial court, enabling the revision petitioners herein to seek the necessary relief for declaration of title and recovery of possession in respect of the small extent of land mentioned above. After remand, the revision petitioners amended the plaint and incorporated the prayer for declaration of title and recovery of possession. As against the decree in O.S.No.57 of 1993, the plaintiffs therein had filed an appeal before the District Court, Mavelikkara, which was allowed and the suit was remanded to the trial court for fresh disposal along with O.S.No.16 of 1992.

4. However, instead of going on with the trial of the suits, the revision petitioners (plaintiffs in O.S.No.16 of 1992) filed an application to withdraw the suit with liberty to file a fresh suit. They contended that there are certain formal defects in the suit and that they should be permitted to withdraw from the suit with liberty to file a fresh suit. It was contended by the petitioners that the total extent of the land is not 22 cents, but 23

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cents and, therefore, all the assignees including the plaintiffs, defendants and one Narayanan Nair are entitled to proportionate benefit of the additional extent of one cent. The revision petitioners pointed out that Narayanan Nair is not a party to the suit and for a proper determination of the real dispute involved in the case, it is necessary to allow the plaintiffs to bring a fresh suit with Narayanan Nair also in the array of parties. The court below took note of the fact that there is no case in the plaint, as now put forward by the petitioners, that they are entitled to the proportionate benefit of the excess extent of one cent of land. The plaintiffs having complied with the direction in the remand order, they are not entitled to apply for withdrawal from the suit with liberty to file a fresh suit. It was also found that the provisions of Order 23 Rule 1 should not be exercised to avoid the judgment passed by the Appellate Court by remanding the case.

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5. Rule 1 of Order 23 deals with withdrawal of suit or abandonment of part of claim. Order 23 Rule 1(3) of the Code of Civil Procedure reads as follows:

"1. Withdrawal of suit or abandonment of part of claim:- (1) xxxx xxx

(2) xxx xxx

(3) Where the Court is satisfied, --

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim."

The requirements for withdrawal from suit with liberty to file a fresh suit are specifically provided in sub-rule (3) of Rule 1. It must be shown to the satisfaction of the Court that the suit must fail by reason of a formal defect or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit.

6. The Supreme Court in **K.S.Bhoopathy and others** v. **Kokila and others** ((2000) 5 SCC 458), considered the scope of Rule 1(3) or Order 23 and held thus:

"..... No doubt, the grant of leave envisaged in sub-rule (3) of Rule 1 is at the discretion of the court but such discretion is to be exercised by the court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided; first where the court is satisfied that a suit must fail by reason of some formal defect, and the other where the court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim. Clause (b) of sub-rule (3) contains the mandate to the court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action..."

7. Should permission to institute a fresh suit be for institution of a suit on the same cause of action as in the suit sought to be withdrawn? Sub-rule (3) of Rule 1 uses the expression "a fresh suit in respect of the subject-matter of such suit or such part of the claim". The subject matter of the suit which is sought to be instituted afresh shall be the same as that of the suit which is sought to be withdrawn. A suit in respect of the subject

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matter which is unconnected with that of the suit sought to be withdrawn cannot be instituted under the guise of a permission granted under sub-rule (3). In other words, no such permission can be granted if the suit sought to be instituted is in respect of a different subject matter. The subject matter mentioned in sub-rule (3) of Rule 1, evidently includes the cause of action as well. The object of sub-rule (3) of Rule 1 is to prevent multiplicity of proceedings and to avoid dismissal of a claim on the ground of an objection regarding formal defect or any other ground which affects the maintainability of the suit. Sub-rule (3) is not intended for permitting a plaintiff to withdraw one suit and institute any suit as he likes. The Rule is intended only to facilitate a proper and effective adjudication of the dispute involved in respect of the subject matter of the suit. A cause of action which is different from the one which was put forward originally, if allowed to be the foundation for the suit to be instituted after withdrawal of the first suit, it would result in unending process. The decision of the Supreme Court in K.S.Bhoopathy's case (supra) clearly indicates that the

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fresh suit should be in respect of the same claim or part of the claim on the same cause of action. In the present case, a fresh suit is sought to be instituted on the basis of a claim which was not put forward originally in the plaint. The plaintiffs want to change their claim on the basis of a different claim for an additional extent of land, which, according to them, is to be shared by all the purchasers. Such a case is not pleaded at all in the suit originally instituted. In the suit as originally instituted, the dispute is in respect of the title of the plaintiffs over a small extent of land. If the plaintiffs are allowed to institute a fresh suit on the basis of the additional extent of land claimed to be available and to be shared equally by the three assignees, it would definitely alter the nature and character of the suit. It would also have the effect of allowing the plaintiffs to institute a fresh suit on a different cause of action. Order 23 Rule 1(3) does not enable the plaintiff to institute such a fresh suit.

8. Another question to be considered is whether the

plaintiffs, against whom certain findings were already rendered in the appeal while remanding the case to the trial court, could be allowed to get out of those findings under the guise of withdrawing from the suit with permission to institute a fresh suit. The Supreme Court in K.S.Bhoopathy's case has clearly laid down the principles in this regard as follows:

".. The court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action. This becomes all the more important in a case where the application under Order XXIII Rule 1 is filed by the plaintiff at the stage of appeal. Grant of leave in such a case would result in the unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting defendant losing the advantage of adjudication of the dispute by the court or courts below. Grant of permission for withdrawal of a suit with leave to file a fresh suit may also result in annulment of a right vested in the defendant or even a third party. The appellate/second appellate court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in Order XXIII Rule 1(3) CPC for exercise of the discretionary power in permitting the withdrawal of the suit with leave to file a fresh suit on the same cause of action. Yet another reason in support of this view is that withdrawal of a suit at the appellate/second appellate stage results in wastage of public time of courts which is of considerable

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importance in the present time in view of large accumulation of cases in lower courts and inordinate delay in disposal of the cases."

The Supreme Court also relied on the decision in **Executive Officer, Arthanareswarar Temple v. R.Sathyamoorthy** ((1999) 3 SCC 115), wherein it was held that if any findings by the trial court in favour of the defendant would get nullified by withdrawal of the suit, permission of withdrawal of the suit should not be granted by the appellate court.

9. The Appellate Court had confirmed the findings of the trial court that the plaintiffs are not entitled to get a permanent prohibitory injunction and that they are not entitled to get a decree for fixation of boundary. The remand was made only for the limited purpose of claiming the relief of recovery of possession based on title and for incorporating a relief for declaration of title. The plaintiffs are, therefore, not entitled to circumvent the remand order and get nullified the findings therein under the guise of instituting a fresh suit after withdrawing from the suit. Rule 1(3) of Order 23 is not intended for such a course being adopted. The court below was

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justified in dismissing the application for withdrawal from the suit. No grounds are made out for interference in revision.

The Civil Revision Petition is accordingly dismissed.

(K. T. SANKARAN)
Judge

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K.T.SANKARAN, J.

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21st June, 2006
